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# Slave Labor in Nuremberg's *I.G. Farben* Case: The Lonely Voice of Paul M. Hebert

Alberto L. Zuppi\*

## INTRODUCTION

The use of forced labor during an armed conflict was the State's common practice for filling up the gaps left behind by the requirements of the human war machine. At the time of World War II, the work of prisoners of war (POWs) was considered, among other dispositions, by the 1899 Hague Regulations and the 1929 Geneva Conventions,<sup>1</sup> and the forced working of the civilian population was delimited to exceptional circumstances by the Convention concerning Forced or Compulsory Labor.<sup>2</sup>

Even in America, the use of forced labor of German POWs during the war accomplished some primary tasks. In 1943, the sugar cane crop in Louisiana might conceivably have been lost without them.<sup>3</sup> However, the rules concerning the treatment of POWs and the civilian population of the occupied territories were totally disregarded by the Axis powers during World War II. The

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1. Annex to the Convention with Respect to the Laws and Customs of War on Land (Hague II) art. 6, July 29, 1899, 187 C.T.S. 436, and Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343. *See also* Brussels Conference on the Rules of Military Warfare, Aug. 27, 1874, 148 C.T.S. 133; Howard S. Levie, *The Employment of Prisoners of War*, 57 Am. J. Int'l L. 318, 319 (1963).

2. ILO No. 29, 39 U.N.T.S. 55, entered into force May 1, 1932, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C029> (last visited Oct. 23, 2005).

3. *See generally* Joseph T. Butler, Jr., *Prisoner of War Labor in the Sugar Cane Fields of Lafourche Parish, Louisiana: 1943-1944*, 14 Louisiana Hist. 283 (1973).

systematic annihilation of detainees and the enslavement of workers for the production of war materials reached a climax during the Nazi dominion over Europe. Never before in the history of mankind was there such a disregard or criminal omission of the most elementary rules protecting the civil population and captive enemy combatants.

Recently, there has been a renewed interest in the question of forced and slave labor by German firms during World War II due to the discussions and final creation of the Foundation "Remembrance, Responsibility and Future."<sup>4</sup> More than six thousand German firms that used forced or slave labor during the Nazi period contributed to the establishment of a fund of more than five billion German marks (Deutsche Mark or DM). That money will be used to pay a personal indemnification to those who were submitted to that kind of work or to their heirs. However, the individual damages were limited to a pre-fixed maximum sum of 5,000 DM for "forced labor" and 15,000 DM for "slave labor," understanding that the latter took place in concentration camps. From the beginning of the discussions to establish the fund, German corporations were adamantly against the acceptance of any legal liability and instead preferred to assert a "moral obligation" as justification for their grudging contributions to the fund.<sup>5</sup>

Sixty years have elapsed since the international prosecution of the major Nazi criminals in Nuremberg, but the horrors and abominations shown in 1946 remain an obdurate abhorrence in the collective memory. One of the twelve main cases after the major trial in Nuremberg was exclusively concerned with the criminal activity of the most important German business consortium in history.<sup>6</sup> The members of the board of I. G. Farben were

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4. See *Gesetz zur Errichtung eine Stiftung "Erinnerung, Verantwortung, Zukunft"* [Remembrance, Responsibility, and the Future], in BGBl 2000 I 1263 and 2001 I 2036. For the English version, see <http://www.stiftungsinitiative.de/eindex.html> (last visited Oct. 23, 2005).

5. Libby Adler & Peer Zumbansen, *The Forgetfulness of Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich*, 39 Harv. J. on Legis. 1, 5 (2002).

6. The Trial of Major War Criminals by the International Military Tribunal (IMT) was held in Nuremberg. See generally 1-42 Trial of the Major War Criminals Before the International Military Tribunal (1947) (USA, France, UK, and USSR v. Hermann Goering et al.). This trial was followed by twelve other cases. This paper analyzes case number six, *U.S. v. Carl Krauch et al.* (1947), known as the "I.G. Farben Case." 7-8 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (U.S. Gov't

prosecuted for helping Hitler to reach power, to wage aggressive war, and for the commission of crimes against humanity, especially the building up of a factory using slave labor in the most emblematic of concentration camps: Auschwitz.

In spite of the overwhelming criminal implications of operating a factory with slave labor in Auschwitz, the American Tribunal in that case rendered a surprisingly lenient judgment against some members of the consortium and acquitted the rest of all major charges. The defendants were highly educated, belonging to a scientific and managerial aristocracy of inventors, Nobel Prize recipients, and entrepreneurs.<sup>7</sup> How can one even conceive that such a highly respected elite could have consented to the use of concentration camp inmates until their collapse? Albeit, if such an accusation was true, how could an American Tribunal in occupied Germany be lenient with it? Only one member of the Tribunal delivered a dissenting opinion in relation to the slave labor account. This paper is concerned with him and his role in that trial.

In the first part of the paper, I will refer briefly to the origin of the post International Military Tribunal (IMT) Nuremberg Tribunals, held in the midst of the rubble of Germany, under the ominous shade of a menacing Soviet Union, and the consequent pressure of what would be known as "the Cold War." A brief history of the Farben group is included in this section. In the second part, I will turn my attention to the *Farben* case itself, the way it was presented by the Prosecution, and the Tribunal's judgment, including a synopsis of the majority's arguments regarding aggression and slave labor. In the last part of the paper, I will analyze the criticisms of Judge Hebert and study the American attitude toward German industrialists on one side, and the American policy regarding war crimes prosecution on the other. I will also discuss the evolution of the subject matter beyond the context of Nuremberg. The conclusions, I hope, will help to explain an unfinished dilemma and its consequences, as well as to realize its further implications for some of the

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Printing Office 1953) (known as the "Green Series") [hereinafter Trials of War Criminals].

7. Matthew Lippman, *The Other Nuremberg: American Prosecution of Nazi War Criminals in Occupied Germany*, 3 Ind. Int'l & Comp. L. Rev. 1, 88 (1992).

international crimes now determined by the Rome Statute for the establishment of the International Criminal Court.<sup>8</sup>

### I. GERMANY GROUND ZERO

During the summer of 1946, when the IMT judging of major war criminals was still under way, the representatives of the military authorities occupying Germany were deciding the feasibility of preparing a second Nuremberg Trial before a new and consecutive IMT.<sup>9</sup> However, no further action was going to be taken before the first IMT rendered a final judgment,<sup>10</sup> which finally happened on October 1, 1946.<sup>11</sup>

When submitting his final report to President Truman, Robert H. Jackson, the Chief American Prosecutor, recommended that any future trials would be more expeditiously resolved if they were held in national or occupation courts rather than in an international tribunal.<sup>12</sup> It is important to be aware of the sense of urgency which exudes from his report. Time was running out for punishment, and the large and somber specter of another war lurked on the horizon.

On January 27, 1947, the U.S. Government informed its allies that it would proceed with the trial of various German war criminals through "Occupation Tribunals" which were to be established in the American Zone.<sup>13</sup> The jurisdictional foundation of these Occupation Tribunals, subsequent to the first IMT trial,

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8. Rome Statute of the International Criminal Court (1998), U. N. Doc. A/CONF.183/9 (1998), available at <http://www.un.org/law/icc/statute/romeofra.htm> (last visited Oct. 23, 2005).

9. Telford Taylor, Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10, 22 (U.S. Gov't Printing Office 1949). Peter Maguire, *Law and War: An American Story* (Columbia Univ. Press 2001), affirms that two tribunals, one for the main Nazi officers and the second for the industrialists, were planned from the very beginning, and when the moment arrived, only the main Nazi war criminals were prosecuted.

10. Taylor, *supra* note 9, at 26.

11. See Trial of the Major War Criminals Before the International Military Tribunal (1946), available at <http://www.yale.edu/lawweb/avalon/imt/imt.htm#proc> (last visited Oct. 23, 2005).

12. See Robert H. Jackson, Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London 1945 (U.S. Gov't Printing Office 1949).

13. See Taylor, *supra* note 9, at 285 n.1. See also Sheldon Glueck, *By What Tribunal Shall War Offenders be Tried?*, 24 Nebraska Law Review 143 (1945).

was Control Council Law (CCL) No. 10, a hybrid between international and national law.<sup>14</sup> This instrument, issued by all four Occupant Powers and based on the Charter of the IMT, defined in a larger form the crimes which would be prosecuted and the rights and duties of each occupying power.

### A. Assembling the Subsequent Tribunals

One day after Jackson's resignation, Military Government Ordinance No. 7 was issued providing details for the composition of subsequent tribunals and the rules that would govern them.<sup>15</sup> Each tribunal was to consist of three members and one alternate judge. All sources agree that it was a considerably difficult task to obtain the desired number of qualified jurists for the future courts.<sup>16</sup> The Military Governor, with the advice of the Director of the Legal Division, would determine which judges to appoint to each particular tribunal and who would preside over them.<sup>17</sup>

At the beginning of 1947, thirty-two names were selected, including twenty-five who were or had been State court judges, six prominent practicing attorneys, and only one law school dean: Paul Macarius Hebert, Dean of the Law School of Louisiana State University (LSU).

Hebert, a native Louisianian from Baton Rouge and a graduate in law from LSU and Yale, was named Dean of Administration of the University when he was just thirty-two years old. His appointment was decided following the so-called "Louisiana Scandals" which rocked the State and even touched the University,

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14. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes Against Peace and Against Humanity, Dec. 20, 1945, 3 Official Gazette Control Council for Germany, 50-55 (1946); M. Cheriff Bassiouni, *Crimes Against Humanity in International Law* 3 (2nd rev. ed. Kluwer Law Int'l 1999). See also Taylor, *supra* note 9, at 250.

15. See Taylor, *supra* note 9, at 286.

16. See, e.g., Lucius D. Clay, *Decision in Germany* 251 (Doubleday & Co. 1950). See also *The Papers of General Lucius D. Clay: Germany 1945-1949* Vol. 1, 261-62 (Jean E. Smith ed., Indiana Univ. Press 1974) (found in the Letter from Clay to Echols, Sept. 4, 1946); Taylor, *supra* note 9, at 34-35; Benjamin Ferencz's account of the Nuremberg Trials in the *Encyclopedia of Genocide and Crimes Against Humanity*, available at <http://www.benferencz.org/encyclo.htm> (last visited Nov. 17, 2005).

17. Taylor, *supra* note 9, at 35. The Farben cause was assigned to the Tribunal for trial by the "Supervisory Committee of Presiding Judges of the United States Military tribunals in Germany" on August 12, 1947. *Id.* at 36.

Hebert being largely responsible for cleaning up the financial irregularities at LSU.<sup>18</sup>

Since the beginning of the American participation in World War II, Hebert was engaged in the Industrial Contracts Division of the Army Judge Advocate General's Corp (JAG). His position was Chief of the Industrial Law Branch of the JAG's office in Washington, serving between April 1942 and October 1945. He obtained the rank of Lieutenant Colonel. There, Hebert undertook several commissions from Undersecretary of War Robert Patterson and it was probably his work in this office that marked him to be designated as civilian judge in the subsequent Nuremberg Trials. Upon recommendation of the Secretary of War, his name was suggested to President Truman.

Hebert and his family left New York on board the *USAT Alexander* on July 8, 1947. After their arrival in Germany via Bremerhaven ten days later, they were redirected to Nuremberg by train. Like his colleagues in the future Tribunal, the group was accommodated in Nuremberg's "Grand Hotel" which was being reconstructed until more suitable accommodations could be located. Hebert was convinced that he was going to be back in Louisiana for the second semester of the 1947-1948 academic year.<sup>19</sup>

On August 9, 1947 the American Military Governor in occupied Germany issued order No. 87 and Military Tribunal No. VI was finally constituted.<sup>20</sup> Curtis Grover Shake, former Justice of the Supreme Court of Indiana, was appointed as its Presiding Judge. The court was going to be staffed by him, James Morris, who was Justice of the Supreme Court of North Dakota, and Dean Hebert. Clarence F. Merrell, a member of the Indiana bar and a friend of Shake's, was designated as an alternate Judge.

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18. See details in the cover and back pages of *The Summer Reveille*, June 27, 1939, with photographs. See also Harnett T. Kane, *Louisiana Hayride: The American Rehearsal for Dictatorship, 1928-1940*, 318 (William Morrow & Co. 1941), and Josiah E. DuBois, *The Devil's Chemists: 24 Conspirators of the International Farben Cartel Who Manufacture Wars* 93 (The Beacon Press 1952).

19. Letter from Paul M. Hebert to then LSU President, Harold W. Stokes (Dec. 3, 1947) (located in Hebert's Personal Files, LSU Archives). Dean Hebert was delighted with his appointment as he expressed to LSU Dean Fray in the letter requesting a leave of absence. See Letter from Paul M. Hebert to then Acting LSU President Fred C. Fray (May 10, 1947) (located in Hebert's Personal files, LSU Archives).

20. Available in Mazal Library at <http://www.mazal.org/archive/nmt/07/NMT07-T0005.htm> (last visited on Nov. 17, 2005).

### B. Bonds with the IMT?

Ordinance No. 7 was issued pursuant to Articles 10 and 11 of the IMT Charter,<sup>21</sup> among others, giving to the competent signatory party the right to bring individuals to trial before "national, military, or occupation courts."<sup>22</sup>

Additionally, Ordinance No. 7, Art. X provided:

The determinations of the International Military Tribunal in the judgments in Case No. 1 that invasions, aggressive acts, aggressive wars, crimes, atrocities or inhuman acts were planned or occurred, shall be binding on the tribunals established hereunder and shall not be questioned except insofar as the participation therein or knowledge thereof by any particular person may be concerned.<sup>23</sup>

The binding character of the IMT decision, then, was to the extent specifically provided in this Ordinance: The indicted facts existed and such evidence counted as a binding determination for the rest of the tribunals.<sup>24</sup> Such a rule was probably inspired by considerations of practical convenience.<sup>25</sup> Albeit, the imperative ruling in relation to the prior IMT determinations does not mean that the issued verdict, as a whole, must be taken as binding law.<sup>26</sup>

As will be explained later, the IMT decision would exercise considerable sway in determining the criminal responsibility of the defendants in the *Farben* case with respect to their crimes against the peace and their conspiracy to perpetrate them.

### C. Hitler's Tires and Gas: I.G. Farben

Since 1916, eight of the main German chemical firms were joined together in what was called "a community of interest"—"*Interessen Gemeinschaften*" or abbreviated "*I. G.*"<sup>27</sup> This

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21. Charter of the International Military Tribunal arts. 10, 11, August 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

22. Control Council Law No. 10, *supra* note 14.

23. Taylor, *supra* note 9, at 289.

24. *Id.* at 290.

25. Maximilian Koessler, *American War Crimes Trials in Europe*, 39 Geo.L. J. 18, 33 (1950).

26. Taylor, *supra* note 9, at 290.

27. They were B.A.S.F. or "Badische Anilin- & Soda-Fabrik," "Farbenfabriken" (former F. Bayer & Co.), "Farbwerke" (formerly "Meister Lucius & Bruenin" from "Hoechst"), "A.G.F.A." or "Aktien-Gesellschaft fuer Anilin-Fabrikation," "Chemische Fabrik Griesheim-Elektron," "Chemische



conglomerate had nearly a total monopoly of German chemical production at the beginning of World War II and, undoubtedly, was one of the main cartels in the world. Its controlling boards rested in the hands of a Surveillance Council, *Aufsichtsrat*, and in the hands of a Board of Directors, *Vorstand*, as was required by German corporate law.<sup>28</sup> The former supervised, at least formally, the overall management of the conglomerate through reports from the *Vorstand*, which was in charge of the daily work of the cartel. The chairman of the Board since 1935 was Hermann Schmitz and the group's most important plants were managed directly by one or more members of the Board. After 1937 the *Vorstand* was built up to twenty-seven members who met monthly and decided issues, according to the conglomerate's bylaws, such as the selling or reduction of plants, the purchase or sale of patents, and the manufacturing or selling in the facilities within the German Empire and abroad. Farben was a unique concern with authentic economic and scientific power, being responsible for more than half of all German industrial chemical exports for most of the prewar period.<sup>29</sup>

In spite of a clear anti-Nazi position at the time Hitler rose to power, when the movement to war was defined, Farben converted itself into one of Hitler's most powerful allies as the fueling impulse of the German war machine. The Farben group was proud of producing an uninterrupted stream of scientific discoveries and inventions. Perhaps the most impressive of them all was the ability to produce synthetic rubber and gasoline from coal—products essential to the German war plan. Some authors presumed that without Farben's immense productivity and experience, Hitler would not have been in a position to start World War II.<sup>30</sup>

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Fabriken" (former "Weiler-ter Meer"), "L.Cassella & Co. GmbH" and "Kelle & Co. AG."

28. See *Handelsgesetzbuch* [HGB] [Commercial Code] Jan. 30, 1937, §§ 231, 243 and German Law on Joint Stock Corporations, Jan. 30, 1937, available in 6 *Trials of War Criminals*, *supra* note 6, at 393–400. The English version of the IG Farben's bylaws are in 7 *Trials of War Criminals*, *supra* note 6, at 386–88.

29. See Raymond G. Stokes, *Divide and Prosper: The Heirs of I.G. Farben Under Allied Authority, 1945–1951* xii (Univ. of Cal. Press 1988). For the story of the group, see Joseph Borkin, *The Crime and Punishment of I. G. Farben* (Free Press 1978).

30. U.S. Group Council, Finance Division, Germany, *Report on Investigation of I.G. Farbenindustrie*, Sept. 12, 1945, cited in Borkin, *supra* note 29, at 1 n.1; see also Stokes, *supra* note 29, at 44.

During the war, to resolve the problem of a shortage of workers, hundreds of thousands of forced and slave workers were forcefully displaced and transported by the Nazis to production facilities in Germany and the occupied territories. According to the figures of the indictment, by 1941, Farben had assigned to its plants 10,000 slave workers. This number doubled in 1942, reaching 58,000 in 1943, 85,000 in 1944, and more than 100,000 by 1945.<sup>31</sup>

### *1. Auschwitz*

Farben's participation in Auschwitz began as early as 1940 when the concern decided to build a major factory designed to cover the production of synthetic gasoline and rubber. The new factory was to be built in the occupied East territories with an investment of, at the time, a quarter of a billion dollars. The place selected for the construction was Auschwitz and the project was approved on April 25, 1941 by the entire Board.<sup>32</sup>

During the construction of the first Farben plant in Auschwitz, Himmler visited the construction site and ordered that it be given priority over all other industrial organizations in the region. But a practical question interfered with the quick finalization of the project: the number of prisoners used in the construction could not be increased, presumably due to the lack of a completed fence and the distance between the place where the prisoners were lodged and the Farben plant.<sup>33</sup>

### *2. Monowitz*

The problem was solved when Farben decided to build a new concentration camp beside the plant in construction. This camp has been called "Auschwitz III," "Auschwitz-Buna," "Buna" or "Monowitz." Different sources estimate that more than 25,000 slave workers paid with their lives during the erection of the plant. Among the inmates of Monowitz was the future Nobel Peace Prize recipient Elie Wiesel who wrote: "The prisoners all agreed, saying 'Buna's a very good camp. You can stand it. The important thing is not to get transferred to the building unit . . . ' As if the choice were in our hands."<sup>34</sup>

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31. 7 Trials of War Criminals, *supra* note 6, at 192.

32. *Id.* at 195.

33. 8 Trials of War Criminals, *supra* note 6, at 1184.

34. Elie Wiesel, *The Night Trilogy: Night, Dawn, the Accident* 56 (Hill and Wang 1985).

Monowitz was surrounded with electrically charged barbed wire fence, watchtowers, and guards provided by the SS. The life span of an inmate coming to Monowitz was approximately three to four months. Exhaustion, malnutrition,<sup>35</sup> freezing in winter, and beatings were the main causes of death.

## II. THE CASE IN NUREMBERG

The *Farben* case opened on August 14, 1947. It was handled in the *Justiz Palast* in the *Further Strasse*, in the same courtroom where a few months earlier the IMT took place. The proceedings were conducted by simultaneous translation in English and German, electronically recorded, and stenographically reported. Sixty lawyers, numerous accountants, and specialists looked after the defendants. The courtroom was totally filled for the trial's beginning. The opening statement for the Prosecution was given by Telford Taylor. The indictment in the case was directed to all living persons who were members of the Board after 1937. At the time of the trial, however, a member who was retired in 1943 with very precarious health was dismissed, remaining therefore were twenty-three defendants.<sup>36</sup> Four defendants who were not members of the Board were indicted, two of them as leading political agents, one as member of *Farben's* Commercial Committee, and the last one because of his position as director and construction manager of several of the conglomerate's plants in Auschwitz.

All of the defendants were indicted for the planning, preparation, initiation and waging of wars of aggression, and invasions of other countries (count one); plunder and spoliation (count two); slavery and mass murder (count three); and common plan of conspiracy (count five). All of the defendants, with one exception, were members of the German Labor Front, most of them belonged to the Nazi Party, and three were additionally indicted for membership in the SS (count four).<sup>37</sup>

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35. Borkin, *supra* note 29, at 120.

36. They were Carl Krauch, Hermann Schmitz, Georg von Schnitzler, Fritz Gajewski, Heinrich Hörlein, August von Knierem, Fritz ter Meer, Christian Schneider, Otto Ambros, Max Brüggemann, Ernst Bürgin, Heinrich Bütefish, Paul Häflinger, Max Ilgner, Friedrich Jähne, Hans Kühne, Karl Lautenschläger, Wilhelm Mann, Heinrich Oster, Karl Würster, Walter Dürrfeld, Heinrich Gattineau, Erich von der Heyde, and Hans Kugler. 7 *Trials of War Criminals*, *supra* note 6, at 11-14.

37. Defendants Schneider, Bütefish, and von der Heyde.

The case ended on May 12, 1948, after fifteen months where one hundred and fifty two trial days demanded nearly sixteen thousand pages of transcription compiled in sixty-four volumes excluding the concurring and dissenting opinions filed by Judge Hebert.

#### A. *Crimes Against Peace*

The Prosecution in the *Farben* case was confronted not just with the considerable difficulty of establishing beyond doubt that the defendants necessarily knew of the rearmament of Germany, but also that the purpose of this rearmament was to wage aggressive wars.

The defense uniformly sustained that the evidence relating to I.G. Farben's role in military war preparations failed to show that the defendants' had the special knowledge, required by the IMT, of Hitler's secret aggressive plans. The defendants further maintained that the evidence did not demonstrate their direct participation in these plans. The Tribunal seemed to accept this reasoning.

The Tribunal understood that, by necessity, the great majority of the population supported the German war effort to some degree. Therefore, some reasonable standard was necessary to determine what degree of participation or support would constitute a crime. In the opinion of the court, the IMT had already fixed such a standard for those who lead Germany into war. On the other hand, none of the defendants could be included in such a high, leading group. In the Tribunal's opinion, a lower standard would lead to a determination of collective guilt with the corollary of mass punishment for which there was no precedent or justification. The Tribunal found that none of the defendants were guilty of the crimes set forth in counts one and five and acquitted them.<sup>38</sup>

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38. Defendants Schneider, Bütefisch, and von der Heyde were additionally charged with membership in the SS, an organization responsible for guarding and administering the concentration camps, and one already declared criminal by the IMT. The Prosecution in the *Farben* case was convinced that it was unnecessary to discuss that intelligent persons, who had been members of the SS for a long period of time, may invoke ignorance about the fact that the organization was used for the commission of crimes against humanity. Although, in the opinion of the court, such a presumption was incorrect if the Prosecution attempted to use it in order to shift the burden of proof to the defendants. According to the majority, the records showed that the membership of the mentioned defendants was casual, innocuous or inconsistent, and, therefore, did not establish the requisite level of guilt.

The use of the doctrine of conspiracy was already criticized at the IMT. It stated that conspiracy had no basis in international law, and since the doctrine required no proof of individual criminal intent beyond the act of association, the potential for abuse was great.<sup>39</sup> Justice Jackson himself, after returning to the U.S. Supreme Court bench, recognized that "[t]he modern crime of conspiracy is so vague that it almost defies definition."<sup>40</sup>

However imperfectly Jackson understood this crime at his return, he was the driving force for laying down in the Nuremberg Charter the crime of aggression and conspiracy to commit it. He carried out a plan originated in the War Department by Secretary Stimson: if a person plans aggression when aggression has been renounced by his nation, then he is a criminal.<sup>41</sup> According to Jackson's biographer, he saw it as his "duty" to codify in the Charter what he understood was existing international law at the time.<sup>42</sup> This view deserved several well-justified criticisms.<sup>43</sup>

Judge Hebert explained at the end of the reading, in a separate statement, that in spite of concurring in the result, the judgment contains many statements with which he did not agree and he reserved the right to file a separate concurring opinion.<sup>44</sup>

### B. Plunder and Spoliation

Among the crimes included in the charges were plunder, exploitation, spoliation, and other offenses against property in the occupied territories. The Tribunal adopted the interpretation

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39. Jeffrey D. Hockett, *Justice Robert H. Jackson, the Supreme Court, and the Nuremberg Trial*, 1990 Sup. Ct. Rev. 257, 269; Franz Neumann, *The War Crimes Trials*, 2 World Politics 135, 139 (1949).

40. *Krulewitch v. United States*, 336 U.S. 440, 446, 69 S. Ct. 716, 720 (1949). Jackson recognized that, as it happened with the German tradition, "[T]he doctrine does not commend itself to jurists of civil law countries." *Id.* at 450, 69 S. Ct. at 721.

41. See Robert H. Jackson, *The Significance of the Nuremberg Trials to the Armed Forces*, 10 Mil. Aff. 2, 4 (1946); Henry L. Stimson, *The Nuremberg Trial: Landmark in Law*, 25 Foreign Aff. 179, 181-84 (1947); Bernard D. Meltzer, *Robert H. Jackson: Nuremberg's Architect and Advocate*, 68 Alb. L. Rev. 55, 57 (2004); Bradley F. Smith, *Reaching Judgment at Nuremberg* 33-36 (Basic Books 1977).

42. Eugene C. Gerhart, *America's Advocate: Robert H. Jackson* 333-44 (Bobbs-Merrill Co. 1958). See also Jackson's letter to Gerhart (Mar. 17, 1949) at 446.

43. Hockett, *supra* note 39, at 267.

44. 8 Trials of War Criminals, *supra* note 6, at 1204.

prepared by another Tribunal in the so-called *Flick Case*.<sup>45</sup> According to this case, the crime was relevant only against the person and not the property. Consequently, the particulars of plunder, exploitation, and spoliation were considered only as charged when alleging the commission of war crimes.

The Tribunal stated that the applicable law for plunder and spoliation was the pertinent part of CCL 10, Article II, 1, (b) which corresponds with Art. 6, sect. (b) of the IMT's Charter.<sup>46</sup> These criminal offenses were also recognized as war crimes under international law prior to the IMT Charter and codified in the Hague's Regulations.<sup>47</sup> The Tribunal established that these war crimes were committed through Farben with respect to properties located in Poland,<sup>48</sup> Norway,<sup>49</sup> France,<sup>50</sup> and Russia.<sup>51</sup>

### C. *Slave Labor*

Under count three, the Prosecution charged the defendants, collectively, individually, and acting through Farben of: participating in the enslavement and deportation of slave labor of the civilian population to territories under German occupation, the enslavement of concentration camp inmates, and the use of prisoners of war in operations directly related to war efforts.<sup>52</sup> It was further alleged that the enslaved persons were mistreated, terrorized, tortured, and murdered.<sup>53</sup> This accusation had special significance considering the deep implication of Farben in the Auschwitz concentration camp.

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45. 6 Trials of War Criminals, *supra* note 6, at 1187–1222 (Case No. 5: U. S. v. Friedrich Flick et al.).

46. See sources cited *supra* note 14.

47. See sources cited *supra* note 1.

48. 8 Trials of War Criminals, *supra* note 6, at 1141.

49. *Id.* at 1144.

50. *Id.* at 1146.

51. *Id.* at 1152. Concerning the responsibility of the defendants, Schmitz as chairman of the *Vorstand*, was found guilty of expressly or impliedly authorizing and improving the spoliation program in the French dyestuff industry and in Norway. *Id.* at 1156–57, 1159–65, and 1167. Von Schnitzler was found guilty in relation with Poland and France like Ter Meer who was, additionally, found guilty in relation with the Russian industry. Bürgin in relation with Poland, Häflinger and Ilgner with Norway, Jahne, Oster and Kugler were also found guilty under this charge.

52. 7 Trials of War Criminals, *supra* note 6, at 50.

53. *Id.* at 51.

The Prosecution gave special attention to some of the conduct considered at the judgment:

a. Poison Gas: The Zyklon B used in the gas chambers to exterminate human beings was manufactured by one firm belonging mainly to the IG Farben conglomerate. However, the majority of the Tribunal concluded that the evidence fell short of establishing the guilt of the Farben board or its members, as having persuasive influence in this firm or any significant knowledge of the uses to which its production was being put.<sup>54</sup>

b. Medical Experiments: The Prosecution asserted that some of the defendants participated knowingly in the supply of Farben vaccines and drugs to the SS for the purpose of testing them on camp inmates. The majority could not overcome a reasonable doubt that any of the accused defendants were principals in, accessories to, ordered, abetted, or took a consenting part in the commission of said crimes.<sup>55</sup>

c. Slave-Labor Program: The Prosecution affirmed that the defendants, through Farben, embraced, adopted, and executed the forced-labor policies of the Third Reich. The majority understood that during the course of war all the main Farben plants suffered serious labor depletion yet were charged with meeting fixed production quotas. Farben yielded to the pressure of the Reich Labor Office and accepted forced labor in its plants. The defendants maintained that utilization of slave labor was the necessary result of compulsory production quotas imposed upon them by the Nazi Government. The majority of the Tribunal accepted this argument of necessity, finding credible evidence that in case of a refusal to reach the set quota, Hitler would have profited from the opportunity to make an example out of a Farben leader. The Tribunal reviewed the IMT, the *Flick* and the *Röchling*<sup>56</sup> cases and considered that a superior order or a law or governmental decree would not justify the defense of necessity, unless one is deprived of a

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54. 8 Trials of War Criminals, *supra* note 6, at 1168.

55. *Id.* at 1169.

56. 14 Trials of War Criminals, *supra* note 6, at 1061–1143 (The case of Hermann Röchling, the indictment, judgment, and judgment on appeal in the Röchling case are reproduced as Appendix B).

moral choice and forced to take a different course of action.<sup>57</sup>

During the trial, a considerable quantity of documents was produced, which proved beyond any doubt the knowledge of the *Vorstand* concerning the use of slave labor in their plants. It should be recalled that the group of defendants was highly cultured, socially-bonded, and strongly linked with the highest level of decision-making—a true scientific and managerial aristocracy. It is difficult to believe the often invoked “different worlds,”<sup>58</sup> defense of the *Vorstand*, considering the stench of the crematorium furnaces working twenty-four hours a day. The Tribunal, however, was reluctant to attribute knowledge to the defendants without concrete proof of a direct engagement in any of the behaviors contemplated in the counts.<sup>59</sup>

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57. 8 Trials of War Criminals, *supra* note 6, at 1179. Therefore, the Court looked into the conduct of the three Farben officials most directly responsible for the construction at Auschwitz. They were Ambros, Bütefisch, and Dürrfeld. *Id.* at 1180. Ambros was the technical expert with the Buna rubber plant, and Dürrfeld worked directly in Auschwitz reporting to the camp commander Höss, and Bütefisch, in addition to having other direct responsibilities, was chairman of the *Fürstengrube* where Polish inmates were forced to work in the mines extracting coal which was directly used by Farben. *Id.* at 1089–90. Additionally, Krauch, as Plenipotentiary General for Special Question of Chemical Production, dealt directly with the distribution of labor to Auschwitz in a manner negating his claim of a lack of knowledge of the employment of concentration camp-inmates. *Id.* at 1187. The same conclusion was reached regarding Ter Meer. *Id.* at 1189–93. Besides these convictions, the majority of the Tribunal could not rule out the defense of necessity as applicable to the rest of the defendants who were members of the *Vorstand* and plant leaders at that time. *Id.* at 1193.

58. *Id.* at 1076. Final Statement of Defendant Dürrfeld:

The concentration camp and IG have been two entirely different spheres, two different spiritual worlds, outwardly and manifestly they are joined by the same name, but there is a deep abyss between the two. Over there you have the concentration camp; here you have the IG plant . . . There orders of lunacy; here you have creative achievement. Over there you find hopelessness; here you find the boldest hopes. Over there you find degradation and humiliation; over here you find concern for the individual man. Over there you find death, and over here you encounter life.

*Id.*

59. Lippman, *supra* note 7, at 88; *see generally* 8 Trials of War Criminals, *supra* note 6, at 1180–96. According to the Prosecution, during the existence of the concentration camp, defendant Ambros had visited the place eighteen times,



Nevertheless, the Tribunal convicted defendants Ambros, Bütefisch, Dürrfeld, Krauch, and Ter Meer under this count, principally for the initiative shown in the procurement of slave labor in the construction of Farben's Buna plant at Auschwitz. The eighteen remaining defendants were all acquitted, fifteen of whom were members of the *Vorstand*. The majority of the Tribunal conceded that slave labor was employed and utilized with the defendant's knowledge and on a wide scale throughout the numerous plants of the Farben organization. However, except in the case of Auschwitz, no criminal responsibility resulted from participation in the utilization of slave labor.

Judge Hebert expressed his dissent with this part of the decision in a two-page, typed paper which was attached to it. His primary disagreement was with the recognition of the "defense of necessity" as applied to the facts proven in this case. In his opinion, all members of the *Vorstand* willingly cooperated in the slave labor program—including the utilization of forced workers, prisoners of war, and concentration camp inmates. He could not convince himself that persons in a position of power and influence like that of the defendants had no knowledge of such a program. His dissenting opinion will be separately considered in this paper.

### III. THE VERDICT

The day when the reading of the verdict began, a devastating explosion blasted I. G. Farben's main plant in Ludwigshafen, near Frankfurt, in the French occupation zone of Germany. The explosion killed more than three hundred people and injured thousands.<sup>60</sup> The origin of the explosion was never conclusively explained. According to the transcripts, prior to the start of the reading of the verdict, the assemblage rose in silent tribute to the victims of the blast. The court was then thanked by the counsel of defendant Schmitz for this act of respect.<sup>61</sup>

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Bütefisch visited on seven occasions, and Dürrfeld lived on the site. Other members of the *Vorstand* visited the place one or two times.

60. Richard O'Regan, *Farben Explosion Kills 300 to 800; 6200 Hurt*, Wash. Post, July 29, 1948, at 1 (The cover page of "The Washington Post" newspaper of July 29, 1948 showed a photograph of the shattered Farben plant in fumes with the title, "6200 Hurt in Disaster; Flames Shoot Miles High; New Explosions Shatter Wrecked Buildings Where 22,000 Worked; 500-800 Are Killed in Farben Plant Explosion.").

61. 8 Trials of War Criminals, *supra* note 6, at 1081.

The judgment was read by all members of the Tribunal alternatively, on three days spanning July 29, 30, and 31. On the last day, thirteen Farben officials were sentenced, but Hebert's protest of the acquittals of a number of defendants was noted on the front page of the *New York Times*.<sup>62</sup> Despite initially opposing the majority in relation to the first count of waging a war of aggression, Hebert had a change of heart. Until nearly the day before the reading of the judgment, he was planning to dissent also on count one.<sup>63</sup> However, he finally served notice that he would enter a dissenting opinion only with respect to count three. On that charge, related to the use of slave labor, he maintained that the evidence presented by the Prosecution justified a guilty verdict for all but three defendants who were not members of the board of directors at the time of the crimes.<sup>64</sup>

Despite a public allegation that the rest of the Tribunal—Shake and Morris—were sympathetic to the defense, the point was never proved.<sup>65</sup> When the verdict was finally delivered, ten of the twenty-three defendants were acquitted of all charges. All were also acquitted from counts one and five. Even those that were prosecuted for being members of the SS were absolved.<sup>66</sup>

DuBois, as a member of the Prosecution, was indignant. He characterized the sentences as "light enough to please a chicken thief, or a driver who had irresponsibly run down a pedestrian."<sup>67</sup>

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62. Kathleen McLaughlin, *13 Farben Aides Sentenced; Judge Protests Acquittals; Jailed for War Crimes 13 Farben Leaders Get Up to 8 Years*, N.Y. Times, July 31, 1948, at 1.

63. See Dubois, *supra* note 18, at 346.

64. 8 Trials of War Criminals, *supra* note 6, at 1307.

65. John Appleman, *Military Tribunals and International Crimes* 180 (Bobbs-Merrill Co. 1954) (citing transcript 15-685-9).

66. Krauch was declared guilty of the charge of spoliation and sentenced to six years in prison. Schmitz was found guilty of count two and condemned to four years. Von Schnitzler was condemned to five years for the same count. Ter Meer was guilty under counts two and three and was condemned to seven years in jail. Ambros and Dürrfeld were declared guilty under count three and each was condemned to eight years. Bürgin and Osterflinger were each found guilty under count two and condemned to two years. Bütelfisch, guilty under count three, was sentenced to six years. Ilgner was found guilty on count two and received a sentence of three years in prison. Kügler and Jähne were both convicted under count two and sentenced to one and a half years in prison (which had already passed in the case of Kügler). 8 Trials of War Criminals, *supra* note 6, at 1206-09. In 1950, all convicted defendants were free.

67. DuBois, *supra* note 18, at 339; see also Stokes, *supra* note 29, at 156.

Some German authors highly encouraged the reading of the decision.<sup>68</sup> Hellmuth Dix, who then was the counsel for defendant Christian Schneider and was later the attorney for the group in further claims, published an article shortly after the judgment in a well-known German legal journal affirming: "So through this proceeding was demolished the myth of the concurring guilt in starting the war and its unhuman consequences by the German Industry and its most important representatives leaving the way free for a peaceful reconstruction."<sup>69</sup>

After the reading of the judgment, the Tribunal adjourned and some days later its members returned to their homes embarking on the ship *General Patrick*. Hebert's dissenting opinion would be drafted at home in Baton Rouge, Louisiana.

### A. *Conspiracy of Predators*

Hebert's decision to issue a dissenting opinion in the *Farben* case was seen as a withering blast to the rest of the Tribunal's members.<sup>70</sup> However, he assumed that his disagreement with the majority's conclusion was not unexpected.<sup>71</sup>

DuBois, who shared a cabin with Hebert aboard the *General Patrick*, wrote:

One of the lawyers who has worked as advisor to the Tribunal had told me that, up until nearly the last day, Hebert had been writing a dissent on the aggressive-war count, holding that Krauch and some of the others were guilty. After an awful struggle of conscience, he had decided to go alone with Shake and Morris on that count.

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68. Herbert Thiele-Fredesdorf, *Das Urteil im I. G. Farben-Prozess*, 10 *Neue Juristische Wochenschrift* 376-77 (1949).

69. Hellmuth Dix, *Die Urteile in den Nürnberger Wirtschaftsprozessen*, 17 *Neue Juristische Wochenschrift* 6, 647, 652 (1949), reprinted in E. Benton & Georg Grimm, *Nuremberg—German Views of the War Trials* 160-176 (SMU Press 1955) (English translation).

70. Robert Conot, *Justice at Nuremberg* 517 (Harper & Row 1983); Maguire, *supra* note 9, at 188-90; Borkin, *supra* note 29, at 155; Frank Buscher, *The U.S. War Crimes Trial Program in Germany, 1946-1955*, 36 (Greenwood Press 1989); see also Benjamin Ferencz, *Less Than Slaves* 35 (Harvard 1979); Cecilia Goetz, *The Fifth Annual Ernst C. Steifel Symposium: 1945-1995: Critical Perspectives on the Nuremberg Trials and State Accountability, Panel 1*, 12 *N.Y.L. Sch. J. Hum. Rts.* 453, 521 (1995).

71. Archive of Jottings by Paul M. Hebert, available at <http://louisdl.louislibraries.org/HNF/Pages/home.php> (last visited November 8, 2005) (on file with author) [hereinafter Archives].

It was clear now that, from the first, the court had been split in two, with Morris and Shake on one side, Hebert and Merrell on the other.<sup>72</sup>

Albeit, DuBois was wrong in relation to Hebert's struggle of conscience. The reasons for Hebert's change of mind, as he showed in his notes, was determined by three factors: a deeper analysis of the IMT precedent in relation to Speer and Schacht, the implications of the French Zone Tribunal decision against Röchling, and an article in a law journal related to the IMT verdict.<sup>73</sup>

I formerly proceeded upon the theory that there was no difference between count 5 (conspiracy) and Count 1. There is a marked difference. Under count five if the defendants participated with knowledge in a common plan to commit crimes against peace, i.e., to initiate or wage aggressive wars, there can be a conviction without the necessity of proving knowledge of specific plans for specific wars at specific times.<sup>74</sup>

The major controversial issue in Hebert's view was the question of war guilt or crimes against peace.<sup>75</sup> "The query which I have to answer to the satisfaction of my conscience . . . is whether any of the defendants fairly come with the group of those bearing a major share of the responsibility for World War II."<sup>76</sup>

He understood that waging aggressive war was a concept where mass guilt might be implied and he recognized the difficulty of demarcating a clear line between who was guilty and who was innocent.<sup>77</sup>

The acquittal by the IMT of Schacht and Speer of the charges of crimes against peace were weighty precedents which had necessarily affected the *Farben* case.<sup>78</sup> The judges of the IMT trial somehow accepted the naive alibi that these defendants, who were among Hitler's main partners in waging war, did not really know

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72. DuBois, *supra* note 18, at 346–47.

73. Hebert's notes frequently quoted, Harold Leventhal et al., *The Nuerenberg Verdict*, 60 Harv. L. Rev 857, 857–906 (1947), referring to the article as the "Harvard article."

74. Archives, *supra* note 71.

75. Paul M. Hebert., *The Nuremberg Subsequent Trials*, The Louisiana Bar Journal, April 1949, at 8.

76. Archives, *supra* note 71.

77. Hebert, *supra* note 75, at 18.

78. See cases cited *supra* note 6.

that the rearmament was intended for aggressive war. Hebert wrote:

As a matter of basic philosophy I do not favor a strict interpretation of the IMT judgment, and feel that, as no industrialist who participated in the rearmament effort of Germany was before the Tribunal in that case, the whole criminal responsibility of the defendants is *res novae*. In my own mind I am convinced that, if one of the principal defendants in this case had been before the IMT on the record such as we have there would have been a finding of guilty.<sup>79</sup>

The undisputable point attached to the dictum of the IMT was that, if the main Directors of the rearmament program—Speer and Schacht—were acquitted, how could a charge be sustained against Schmitz and the rest of the I. G. Farben board? It is correct to assume that to prosecute Farben's directors with such a precedent was futile from the beginning.

The acquittal of the leading officials of the Krupp firm, whose verdict was known only the day after finishing the *Farben* case, was also understood as a strong precedent in Hebert's research while drafting his separate opinions.<sup>80</sup> The acquittal in the French Zone of officials of the Röchling firm also weighed in his considerations. Such precedents, coupled with a most liberal application of the rule of "reasonable doubt" in favor of the defendants, resulted in his reluctance to draw inferences unfavorable to the defendants on these counts.

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79. Archives, *supra* note 71.

80. See generally 9 Trials of War Criminals, *supra* note 6. Judge Anderson, President of the Tribunal in the "Krupp Case," thought that liability for planning aggressive war should be limited to the leaders who did the planning and not civilians who were not policy-makers. He wrote:

The requisite knowledge, I think, can be shown either by direct or circumstantial evidence but in any case it must be knowledge of facts and circumstances which would enable the particular individual to determine not only that there was a concrete plan to initiate and wage war, but that the contemplated conflict would be a war of aggression and hence criminal. Such knowledge being shown, it must be further established that the accused participated in the plan with the felonious intent to aid in the accomplishment of the criminal objective. In the individual crime of aggressive war or conspiracy to that end as contradistinguished to the international delinquency of a state in resorting to hostilities, the individual intention is of major importance.

*Id.* at 436.

However, in his view, the vast volume of credible evidence which the Prosecution presented to the Tribunal made him disagree with the majority conclusion that the evidence presented in the case was insufficient.<sup>81</sup> He truly believed that the defendants indeed knew that they were preparing all their production for a possible war. He understood as certain that their actions were not just the normal activities of businessmen. Farben, under the leadership of the defendants, pursued a course of action which should be understood as adverse to the cause of international peace in numerous respects.<sup>82</sup> In spite of this behavior, the proof produced in the case did not meet the extraordinary standard required by the precedents for a guilty conviction.<sup>83</sup>

In the separate concurring opinion on this point, he affirmed that in spite of the violent Nazi regime, nothing deterred the top leadership of the Farben corporation from supporting it. Albeit, in order to bring the participants within the frame of the required accountability, Hebert recognized that their participation must have been substantial and accompanied by the requisite criminal state of mind.

I conclude that, however desirable such a legal conception of the requisite of knowledge might be as a matter of policy in international law, the proposition advanced in this definition of state of mind is too broad and goes beyond the provisions of Control Council Law No. 10.<sup>84</sup>

The required participation must have been with the concrete plan to wage an aggressive war, though not necessarily against a certain country or at a certain time.

In the case of the Farben defendants, while they know that acts of aggression had been and were being carried out in connection with Austria and Czechoslovakia, and, in fact, the defendants participate in acquiring industries resulting from the acts of aggression mentioned, it cannot be concluded that such action necessarily amounts to the requisite knowledge or state of mind constituting plans to wage aggressive war.<sup>85</sup>

It was impossible to determine when, if ever, the defendants agreed to join an enterprise constituting crimes against peace or

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81. 8 Trial of War Criminals, *supra* note 6, at 1308.

82. *Id.* at 1302, 1303

83. *Id.* at 1304.

84. 8 Trials of War Criminals, *supra* note 6, at 1302.

85. *Id.* at 1303.

joined such an alleged conspiracy. Likewise, Hebert refused to accept the position that the defendants participated in the common plan for the initiation of wars of aggression, as defined and limited by the judgment of the IMT.

The conflict shown by the swinging back and forth position in relation to the crime of aggression and its conspiracy anticipated a problem which would be seen in the following decades. The concept of aggression is one of the most critical, elusive, and vague locutions in international law, a problem not resolved at the United Nations<sup>86</sup> and not resolved during by the Rome Conference in preparing the Statute of the International Criminal Court.<sup>87</sup>

### *B. Hebert's Lonely Voice: Farben's Directors and Slave Labor*

In Hebert's opinion, Farben accepted and willingly utilized slave labor. Hebert concurred with the conviction of the five defendants, but he was of the opinion that their criminal responsibility went much further than merely embracing those connected with the Auschwitz plant.

In my view, all the members of the Farben Vorstand should be held guilty under Count Three of the indictment not only for the participation by Farben in the crime of enslavement at Auschwitz, but also for Farben's widespread participation and willing cooperation with the slave labor system in the other Farben plants . . . .<sup>88</sup>

It should be noted that governmental compulsion was merely a matter to be considered as mitigation of guilt.<sup>89</sup> In the *Farben* case, the evidence showed no credible proof that any of the defendants were opposed to the use of slave laborers. On the contrary, the record showed that Farben willingly cooperated and gladly utilized each new source of manpower as it developed.<sup>90</sup> According to Hebert:

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86. See Julius Stone, *Conflict Through Consensus* (Johns Hopkins Univ. Press, 1977); Gert Meier, *Der Begriff des bewaffneten Angriffs*, 24 *Archiv des Völkerechts* 173, 182 (1986) (criticizing the lack of an accurate definition obtained by the U.N.G.A. Res. 3314 (XXIX) "Definition of Aggression").

87. The magnitude of its conflictive understanding is conspicuous in the recent compromise expressed by the second paragraph of Article 5 of the Rome Statute and in the postponement of resolving the matter presumed until 2009. See Rome Statute, *supra* note 8.

88. 8 Trials of War Criminals, *supra* note 6, at 1308.

89. See Control Council Law No. 10, *supra* note 14, Art. II, § 4(b).

90. See 8 Trials of War Criminals, *supra* note 6.

I cannot agree that there was an absence of a moral choice. In utilizing slave labor within Farben the will of the actors coincided with the will of those controlling the Government and who had directed or ordered the doing of criminal acts . . . .<sup>91</sup>

Hebert stated that accepting the defense of necessity would have led to the conclusion that Hitler alone was responsible for the major war crimes and crimes against humanity committed during the Nazi regime.

Such doctrine constitutes, in my opinion, unbridled license for the commission of war crimes and crimes against humanity on the broadest possible scale through the simple expediency of the issuance of compulsory governmental regulations combined with the terrorism of the totalitarian police state. The essence of a truly effective system of international penal law lies in its applicability to the acts of individuals who are not privileged to disregard the overriding commands of international law when they come in conflict with the contrary policies or directives of a State not desiring to abide by the principles of international law.<sup>92</sup>

The use of such a defense would mean that unless a defendant exercised unusual initiative to bring about participation in the utilization of slave labor or showed an initiative going beyond the requirements of the cruel regulations, no crime was committed. Farben's complete integration into the war machinery was not considered by the majority as "exercising initiative."<sup>93</sup> Even putting the workers behind barbed wire fences or erecting a disciplinary camp at the Farben plant were actions protected by this interpretation of "necessity."<sup>94</sup> Hebert thought that the defense that the plans concerning the Auschwitz Buna Plant were unknown to all members of the *Vorstand* was unacceptable.

I find it hard to understand why the majority can conclude that construction and production at Auschwitz was not under Reich compulsion when the Reich wanted the plant for war production and directed its erection, and production involving utilization of slave labor in other plants was

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91. *Id.* at 1309.

92. 8 Trials of War Criminals, *supra* note 6, at 1310; *see also* Goetz, *supra* note 70, at 525.

93. 8 Trials of War Criminals, *supra* note 6, at 1319 et seq.

94. *Id.* at 1323.



"under compulsion." The answer, it seems to me, lies in the fact that the freedom was as real in all the Farben plants and the similar attitude of willing cooperation was present—differing at Auschwitz only in the matter of degree.<sup>95</sup>

He found that the criminal intent required as a prerequisite to guilt under the charge of war crimes and crimes against humanity was present if the corporate officer knowingly authorized the participation of the corporation in an action of a criminal character.<sup>96</sup> From the outset of the Buna Project it was known that slave labor from the concentration camp was going to be the principal source of labor for the project. Utilization of such labor was approved as a matter of corporate policy.<sup>97</sup> He concluded that all the members of the *Vorstand* viewed the availability of such labor and its subsequent employment at Auschwitz as an "assistance" to Farben and, accordingly, all defendants should share in the responsibility for its utilization.<sup>98</sup>

The evidence established that the conditions at Auschwitz were inhuman to an extreme degree. It was cited as credible evidence the testimony of a number of British prisoners who spoke about inmate conditions.<sup>99</sup> Perhaps, as Speer contended in the IMT decision, the defendants were not directly concerned with cruelty in the administration of the slave labor program; but certainly as it happened with Speer, they were perfectly aware of its existence and they profited from the total disregard of any moral or legal consideration. "I am of the opinion that each defendant who is a member of the *Vorstand* should be held guilty under count three of the indictment . . ."<sup>100</sup>

Hebert's position on this crime went alone as dissidence. An aura of impunity pervaded the judgment of the case.

### *C. American Leniency Against Industrialists*

After returning from Nuremberg, Hebert reaffirmed the importance of the trials. He felt that they constituted a relevant part of the background considered in any movement, similar to the movement started at that time by the United Nations Organization

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95. *Id.* at 1313.

96. *Id.*

97. *Id.*

98. *Id.* at 1325.

99. *Id.* at 1320.

100. *Id.* at 1325.

for the future codification of international law. He was convinced that such important work would eventually lead to an international criminal code.<sup>101</sup>

By 1947, some of the most prominent American jurists were beginning to turn against the war tribunals. For many of them, the menace presented by the Soviets blurred the inhumanities shown during the court sessions. A Congressman, with clear anti-Semitic tones, attacked the Nuremberg trials in the House of Representatives saying: "[A] racial minority, two and a half years after the war closed, are in Nuremberg not only hanging German soldiers but trying German businessmen in the name of the United States."<sup>102</sup>

Among the critics of the U.S. war crimes punishment program were even members of the judiciary. Chief Justice Harlan Fiske Stone described the Nuremberg trials as a "high grade lynching party."<sup>103</sup> Justice William O. Douglas believed that the guilt of the Nazi leaders "did not justify us in substituting power for principle."<sup>104</sup> Former judge Charles Wennerstrum, an Iowa Supreme Court justice who served as presiding judge in the Nuremberg *Hostages* case,<sup>105</sup> noted that, "If I had known seven months ago what I know today, I would never have come here."<sup>106</sup>

Taylor questioned Wennerstrum's statements, but the damage was already done.<sup>107</sup> DuBois recalls that the War Department did not support charging the industrialists because it in no way wanted

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101. The Daily Reveille, Sept. 17, 1948, at 4C. See also Paul M. Hebert, *The Nuremberg Subsequent Trials*, 16 Ins. Council J. 226, 231 (1949):

It is certain that the twelve judgements rendered in the Nurnberg subsequent proceedings will have an important bearing upon the future development of international penal law. The trials served to focus attention upon shortcomings of existing international law and a body of valuable materials has been collected for the codifier of the future. A by-product should be a strengthening of a world conception of law and the erection of legal standards to which the civilized nations of the world may adhere.

102. Conot, *supra* note 70, at 517.

103. Alpheus T. Mason, *Harlan Fiske Stone: Pillar of the Law* 716 (Viking 1956).

104. William O. Douglas, *An Almanac of Liberty* 96 (Doubleday 1954).

105. U.S. v. List et al. (Case No. 7), 11 *Trials of War Criminals*, *supra* note 6.

106. Hal Foust, *Nazi Trial Judge Rips "Injustice,"* Chi. Trib., Feb. 23, 1948, at 1.

107. *Prosecutor Scores War-Crimes Judge*, N.Y. Times, Feb. 23, 1948, at 5 See Buscher, *supra* note 70, at 35.

to discourage the American industrialists from supplying U.S. troops with war material for fear of having these kinds of charges brought against them in future conflicts.<sup>108</sup> Another scholar presumed that the lenient punishment given to the industrialists fit with the American judicial tradition of giving light sentences for white-collar crime.<sup>109</sup>

Buscher affirms that by the end of the 1940s:

[M]any in the United States had accepted that the convicted Nazi perpetrators were not criminals, but were instead the victims of the Allied war crimes program. This attitude, which played greatly into the hands of the German anti-trial lobby, further lessened the commitment of U.S. authorities to carry out the program as originally intended.<sup>110</sup>

William Caming, who was Chief Prosecutor in the *Ministries Case No. 11*,<sup>111</sup> recalled how global politics hit Nuremberg like an artillery shell: "We had visits from congressmen and senators who favored the re-armament of Germany and who said that we had to get rid of the trials because they're an obstacle."<sup>112</sup>

In the fall of 1947, visitors from the U.S. Congress joined the chorus against the de-Nazification program and the House Select Committee on Foreign Aid in its Final Report recommended that it should be ended by May 1948.<sup>113</sup> Representatives Taft (R-Ohio), Case (R-South Dakota), Dondero (R-Michigan), Knutson (R-Minnesota), and Taber (R-New York) harshly criticized the U.S. for continuing the prosecution of Germans when the other Allies had stopped.

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108. Dubois, *supra* note 18, at 21–22.

109. Stokes, *supra* note 29, at 153.

110. Buscher, *supra* note 70, at 37.

111. U.S. v. Von Weizsaecker et al. (Case No. 11), in 12-14 Trials of War Criminals, *supra* note 6.

112. General Clark received a letter from a colleague who considered the IMT subsequent Tribunals as part of a "scheme designated to strip the financier and industrialists of Germany of their wealth and to destroy German capitalism." See American Radio Works, *The Legacy of Nuremberg*, July 2002, <http://americanradioworks.publicradio.org/features/justiceontrial/nuremberg1.html> (last visited Oct. 23, 2005).

113. John Gimbel, *The American Occupation of Germany: Politics and the Military, 1945–1949*, 171 (Stanford Univ. Press 1968). For a discussion on the de-Nazification policy in occupied Germany, see Edward N. Peterson, *The American Occupation of Germany 138–73* (Wayne State Univ. Press 1977).

*D. A Prosecutorial Mistake?*

How could a clear case of the use of slave labor in Auschwitz have finished with such lenient judgment? It is presumed that by late 1946 and early 1947, fiscal and administrative constraints were forcing Taylor to finally begin the delayed trials without being properly prepared.<sup>114</sup> Many observers considered as the Prosecution's main error the fact that the *Farben* case was presented like an antitrust case as opposed to a war crimes case.<sup>115</sup> Retrospectively, it is perhaps understandable that the Prosecution believed it had a clear and easy case against a concern which had built its own concentration camp in Auschwitz—itsself, a name which is today associated with pure evil. In his opening statement Taylor said:

The crimes with which these men are charged were not committed in rage, or under the stress of sudden temptation; they were not the slips or lapses of otherwise well-ordered men. One does not build a stupendous war machine in a fit of passion. Or an Auschwitz factory during a passing spasm of brutality.<sup>116</sup>

DuBois, who was also in charge of the Prosecution, recognized that the idea of showing a huge cartel responsible of crimes and with ramifications everywhere from Bern to Bombay made the Tribunal impatient after the third day.<sup>117</sup> Of the two volumes of the condensed version of the trial in the Green Series, the first one is entirely concerned with count one. The rest of the counts, including the slave labor count, required just two-thirds of the second volume. "Whatever the impact of this evidence may be on the writing of history, it made little impression on two of the judges. The evidence of this knowledge of Hitler's aggressive intentions 'degenerates from proof to mere conjecture.'"<sup>118</sup>

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114. Mark E. Spicka, *The Devil's Chemist on Trial: The American Prosecution of I. G. Farben at Nuremberg*, 68 *The Historian* 2, 865, 877.

115. Borkin, *supra* note 29, at 141; Cf. Spicka, *supra* note 114, at 878 (asserting it was not because of the antitrust background of the Prosecutors as suggested by Stockes).

116. 7 *Trials of War Criminals*, *supra* note 6, at 100.

117. DuBois, *supra* note 18, at 77 ("We had planned to show first the defendants' places in the organization, then go to reconstruct their acts in official relations to each other. Now we had to change the plan.").

118. Taylor, *supra* note 9, at 197.

Reading DuBois' chronicle, it is easy to share his disappointment with some of the judges' attitudes.<sup>119</sup> However, the work of the Prosecution on this part of the trial somehow exudes naïveté.<sup>120</sup> They were so convinced of Farben's participation in the rebuilding of the German war machine that it seemed the only concern of the Prosecution was to show how intricate and detailed Farben's involvement in the chemical industry had become in the world.<sup>121</sup> The chemical conglomerate had an active role in the Nazi regime. They used their position among the German decision-makers to take advantage of Germany's conquest of Europe, subjugating the chemical industry in any territory occupied by the Nazi war machine. They turned a blind eye to the meaning of the concentration camp Auschwitz as the epitome of all evil and to the mass murder carried out by the Nazis.<sup>122</sup>

The policy of the U.S. military occupation government in Germany was subject to a variety of influences—domestic ones like Congress, international like the position of the American Allies, and the growing Cold War tensions.<sup>123</sup> Some authors felt that the U.S. government gave clear signals. According to Buscher, even a closeout date for finishing the trials was fixed for June 30, 1948.<sup>124</sup>

How far was the majority influenced by all of these factors? The sense of urgency and anxiety is palpable when reading the case. The Tribunal seemed fastidious with the Prosecution and its strategy<sup>125</sup> and constrained by the growing external dangers. At one moment, Judge Morris uttered to the Prosecution:

Mr. Prosecutor, this organization, so far as record shows here, was simply a big chemical, commercial and business concern, the like of which there are many throughout the world. Speaking for myself only, I am at a complete loss to comprehend where documents of this kind are of the slightest materiality to the charges. This trial is being slowed down by a mass of contracts, minutes and letters

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119. DuBois, *supra* note 18, at 92–96.

120. See Goetz, *supra* note 70, at 529.

121. DuBois, *supra* note 18, at 82–83.

122. Stokes, *supra* note 29, at 30; *see generally* Richard Sasuly, I.G. Farben (Boni & Gaer 1947).

123. Gimbel, *supra* note 113.

124. Buscher, *supra* note 70, at 52.

125. 7 Trials of War Criminals, *supra* note 6, at 1391, 1585–86, 1591, 1595; 8 Trials of War Criminals, *supra* note 6, at 36, 63, 234, 244, 289.

that seem to have such a slight bearing on any possible concept of proof in this case.<sup>126</sup>

DuBois remembers:

I recall getting acquainted with Morris at a luncheon on the first day of the trial. Looking around the once-bomb-smashed ceiling, he'd shaken his head and said. "We have to worry about the Russians now; it wouldn't surprise me if they overran the courtroom before we get through."<sup>127</sup>

The notion that Morris' judgment was affected by the Russian menace seems to be confirmed by an unpublished letter from Morris to DuBois.<sup>128</sup> Speaking with a journalist after retirement, Morris explained that as judge in Nuremberg,

I feel some people were tried who should not have been . . . . They were a bunch of eager selfish big businessmen like you would find in any country . . . . I had many bitter arguments with several members of the judicial panel and my name was mud in Washington.<sup>129</sup>

This comment synthesized the majority's opinion of Farben's directors: just a bundle of greedy businessmen, extremely eager to possess the chemical power of occupied Europe.

### CONCLUSION

By 1951, all of the convicted defendants in Nuremberg's *Farben* case were free. Norbert Wollheim, a German citizen and former slave laborer at Monowitz who had given testimony in the

126. DuBois, *supra* note 18, at 82.

127. *Id.* at 95.

128. See Hebert L. Meschke & Ted Smith, *The North Dakota Supreme Court: A Century of Advances*, in 76 N.D. L. Rev. 217, 256-57 (2000). According to this letter, Morris confirmed to DuBois: "I am glad, too, that your book recognizes my appreciation of the Russian menace." *Id.* at 256. DuBois answered Morris in a letter:

The second paragraph of your letter in which you state that "the Russians did overrun the courtroom," highlights to me one point which I tried to make in the concluding chapters of my book, namely, that in my judgement, the fear of Russia and communism weighed so heavily on your mind that you grossly misinterpreted, in good faith, many incidents.

Letter from Josiah E. DuBois to Honorable James Morris, Chief Justice of the North Dakota Supreme Court (Apr. 9, 1953) (on file with the author).

129. See Lucille Hendrickson, *Judge Morris Recalls Nuremberg*, The Bismark Trib. (Paul M. Hebert Archives, Louisiana State University).

case, was dismayed by the laxity of the judgment.<sup>130</sup> In 1951, he filed a claim against the group contending that his enslavement had been consented to by Farben's directors. After obtaining a favorable decision in June 1953 and on appeals in February 1957, the Frankfurt Appeals Chamber summoned for an agreement reaching a record sum of thirty million DM. The agreement was conditioned on the passage of an act through Parliament authorizing further claims against I.G. Farben.<sup>131</sup> More than 6,500 former slaves that worked in Buna received a sum between DM 2,500 and DM 5,000.<sup>132</sup>

One of the few American cases concerned with the Holocaust was a case of another survivor of Monowitz whose indemnification had been refused because he was neither a German national nor a "refugee" at the time of his enslavement.<sup>133</sup> At the time of his claim, Princz had American citizenship, but the court rejected the argument that *ius cogens* violations amount to an implied waiver of state immunity and refused to apply the Foreign Sovereign Immunity Act, opting to recognizing the German-invoked sovereign immunity.<sup>134</sup> The U.S. Supreme Court denied certiorari leaving the claimant without any further procedural help, which was strongly criticized.<sup>135</sup>

The ghost of the unfinished past of the *Farben* case continues to haunt the present. In October 1998, the newly elected German

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130. Ferencz, *supra* note 70, at 35.

131. LG and OLG Frankfurt Az. 5 U 122/53. See Karl Brozik, Die Entschädigung von nationalsozialistischer Zwangsarbeit durch deutsche Firmen, in Entschädigung für NS—Zwangsarbeit—Rechtliche, historische und politische Aspekte 33-47 (Klaus Barwig et al. eds., Nomos 1998). See the so called "Aufrufgesetz," in BGBl I 569 from May 27, 1957. See also Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Dec. 7, 2004, Entscheidungen des Bundesverwaltungsgerichts [BVerfGE] 1804 (F.R.G) (considering the constitutionality of the Foundation, "Remembrance, Responsibility, and Future", cited *supra* note 4).

132. Brozik, *supra* note 131, at 43.

133. Princz v. Federal Republic of Germany, 26 F.3d 1166 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1121, 115 S. Ct. 923 (1995).

134. 28 U.S.C. § 1605 (a)(1) (2002); Princz, 26 F.3d at 1184-85 (Wald, J., dissenting).

135. Princz v. Federal Republic of Germany, 513 U.S. 1121, 115 S. Ct. 923 (1995). The House and Senate passed a unanimous resolution supporting Mr. Princz. 141 Cong. Rec. E681-02 (daily ed. Mar. 24, 1995) (Statement of Mr. Schumer). Mathias Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on Princz v. Federal Republic of Germany*, 16 Mich. J. Int'l L. 403 (1994-1995).

Chancellor, Gerhard Schröder, announced that his government was prepared to support the establishment of a foundation to compensate slave laborers. On July 17, 2000, a compensation agreement for former concentration camp slaves and forced laborers, including the I. G. Farben consortium, was signed by the main negotiators representing the German Government, the firms engaged in slave labor, and a Board of Trustees integrated by representatives of Israel, Poland, Belarus, Ukraine, Chechnya, and the U.S.A. This agreement led to the establishment of a foundation created under German law called "Memory, Responsibility and Future."<sup>136</sup> The work for the preparation of the Foundation renewed the interest of scholars in the activities of the Farben group during the Nazi period.<sup>137</sup>

The exploitation of prisoners' labor was not a new development discovered by the I. G. Farben group during World War II. However, never before had such a brutal reality of man's inhumanity been shown. The *Farben* case displayed a cynical scenario of greed and depravity. Regardless of the overwhelming evidence of the Board's liability for the criminal decision to build up a factory in the most notorious camp of extermination, stubbornly the Prosecution engaged itself in a meaningless pursuit of a conspiracy of industrialists with the German war machine, undoubtedly weakening the accusation.

Hebert was deeply concerned with two of the main charges. First, the one related to the count of aggression and conspiracy which, at the very eve of the judgment's delivery, Hebert changed into a concurring opinion with the majority. This change of mind could be attributed to Hebert's belief that it made little sense to

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136. See sources cited *supra* note 4. See Stuart E. Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor and the Unfinished Business of World War II* 206–28 (Public Affairs 2003); Michael J. Bazyler, *Holocaust Justice: The Battle for Restitution in America's Courts* 59–109 (N.Y. Univ. Press 2003).

137. Bernd C. Wagner, *IG Auschwitz: Zwangsarbeit und Vernichtung von Häftlingen des Lager Monowitz 1941–1945*, Vol. 3, (K. G. Saur Vlg. 2000); Mark Spörer, *Unternehmen in National-Sozialismus* (Beck 1998) and *Zwangsarbeit unter dem Hakenkreuz: Ausländischer Zivilarbeiter, Kriegsgefangene und Häftlinge im Deutschen Reich und im besetzten Europas 1939–1945*" (Deutsche Vlg. Anstalt 2001); Christoph J. Safferling, *Zwangsarbeiterentschädigungsgesetz und Grundgesetz*, 34 *Kritische Justiz* 208 (2001); Sandro Blanke, *Der lange Weg zur Entschädigung von NS-Zwangsarbeitern*, 34 *Kritische Justiz* 195 (2001); Roland Bank, *Die Leistungen an NS-Zwangsarbeiter durch die Stiftung "Erinnerung, Verantwortung und Zukunft"*, in "Die Rechtstellung des Menschen im Völkerrecht," 83–114 (Mohr 2003).



prosecute subalterns when the principals had been previously acquitted by the IMT. Secondly, Hebert was deeply concerned with the criminal liability of this group of industrialists who, morally poisoned by greed and inhumanity, built up a factory in one of the most paradigmatic and horrific extermination camps. The lenient decision of the majority, without consistent legal reasoning, should be seen as a blind bowing to the American decision to bring to an end the prosecution of German war criminals. We might wonder if the reconstruction of Germany was not more than a plausible justification for this decision. The Cold War had imposed its own speed to international relations and mankind was engaged in the beginning of a new world order where the killings perpetrated during World War II were no longer given priority. Man's inhumanity to man was not new and the future would show, decades later, repetition of acts presumed never to be repeated again. The case was forgotten by history. The lonely voice of Hebert endured, however, the passing of time.